

Spring 1990

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James C. Gray Jr.

Lisa D. Catt

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THE LAW OF INDEMNITY IN SOUTH CAROLINA

JAMES C. GRAY, JR.*

LISA D. CATT**

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I. INTRODUCTION

In 1988 South Carolina enacted legislation creating a right of contribution among joint tortfeasors¹ which, in turn, created a new inter-

* Partner, Nelson, Mullins, Riley & Scarborough, Columbia, S.C. B.A., 1970, Emory University; J.D., 1979, University of South Carolina School of Law.

** Associate, Nelson, Mullins, Riley & Scarborough, Columbia, S.C. B.A., 1982, Furman University; J.D., 1985, Duke University School of Law.

1. See S.C. CODE ANN. § 15-38-20 (Law. Co-op. Supp. 1989).

est in the principle of indemnity.² Unlike contribution, however, indemnity has deep roots in South Carolina law.³

A. *The Concept of Indemnity*

The South Carolina Supreme Court in *Atlantic Coast Line Railroad v. Whetstone*⁴ set forth a common explanation for indemnity, stating:

"Ordinarily, if one person is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another, he may maintain an action over for indemnity against the person whose wrong has thus been imputed to him; but this is subject to the proviso that no personal negligence of his own has joined in causing the injury."⁵

This form of indemnity is implied at law and should be distinguished from contractual indemnity, which involves a transfer of risk for consideration.⁶ Implied indemnity is based upon the specific relation of the indemnitee to the indemnitor in dealing with a third party.⁷ Conversely, contractual indemnity requires nothing more than a contract as its relational premise.⁸

Implied indemnity also differs from contractual indemnity in that it rests upon the legal notion of restitution,⁹ which flows from an unjust enrichment at the expense of another.¹⁰ In other words, implied indemnity is essentially an equitable doctrine that allows one who is

2. The contribution statute, however, does not affect the law of indemnity. *See id.*

3. As early as 1853, South Carolina courts held that contracts of indemnity entitled the indemnitee to an action for recovery of payments made, costs, and interest. *See Sims v. Goudelock*, 27 S.C. Eq. (7 Rich. Eq.) 23 (1853).

4. 243 S.C. 61, 132 S.E.2d 172 (1963).

5. *Id.* at 70, 132 S.E.2d at 176 (quoting *North Carolina Elec. Power Co. v. French Broad Mfg. Co.*, 180 N.C. 597, 105 S.E. 394 (1920)).

6. A third type of indemnity is that which is provided by statute, as in the Uniform Commercial Code. *See* S.C. CODE ANN. § 36-2-607 (Law. Co-op. 1976); *see also infra* notes 170-207 and accompanying text (discussing indemnity provisions of the U.C.C.).

7. *See infra* text accompanying notes 20-26.

8. *See infra* notes 80-82 and accompanying text.

9. Some courts hold that the duty arises from contract. *See, e.g., Sachs v. Commissioner*, 277 F.2d 879 (8th Cir.), *cert. denied*, 364 U.S. 833 (1960); *Vandiver v. Pollak*, 107 Ala. 547, 19 So. 180 (1895); *Westville Land Co. v. Handle*, 112 N.J.L. 447, 171 A. 520 (Super. Ct. 1934); *Kennedy v. Colt*, 216 Or. 647, 339 P.2d 450 (1959); *H.M.R. Constr. Co. v. Wolco, Inc.*, 422 S.W.2d 214 (Tex. Ct. App. 1967). Other courts have concluded that indemnity may be based on a quasi-contractual obligation that is created by law for reasons of justice without the assent of either party. *See, e.g., Cox v. Shaw*, 263 N.C. 361, 139 S.E.2d 676 (1965).

10. *See* RESTATEMENT OF RESTITUTION § 1 (1937).

legally liable, but otherwise innocent, to recover from one whose conduct or omission has caused liability to be imposed upon the former.¹¹

B. Indemnification and Contribution Distinguished

Indemnity has been called "only an extreme form of contribution."¹² Nevertheless, indemnity and contribution technically address different issues. Contribution applies to cases in which multiple tortfeasors cause a single injury and one tortfeasor pays more than his proportionate share to discharge the liability of all.¹³ The paying tortfeasor then may seek contribution from the co-tortfeasors so that the loss is equally borne by all.¹⁴ Indemnity, on the other hand, applies when one person discharges a liability that should have been discharged by someone else and subsequently seeks reimbursement from the person who, by rights, should have paid the loss.¹⁵ Thus, the major difference between indemnity and contribution is that indemnity shifts the entire loss to another party, while contribution assures that the loss is distributed among the several responsible parties.¹⁶

A final distinction between the two concepts concerns the effect of a party's negligence. If two parties are joint tortfeasors, they may seek contribution from each other, even when the party suing is negligent.¹⁷ The same parties, however, would have no right to indemnity.¹⁸ In fact, in the absence of a contractual or a legal relationship between the parties, a party who is negligent cannot maintain an action for indemnity in South Carolina.¹⁹

11. See *Atlantic Coast Line R.R. v. Whetstone*, 243 S.C. 61, 132 S.E.2d 172 (1963).

12. *Slattery v. Marra Bros.*, 186 F.2d 134, 138 (2d Cir.), cert. denied, 341 U.S. 915 (1951).

13. See Brunson, *Contribution in South Carolina—Venturing into Uncharted Waters*, 41 S.C.L. REV. 533, 539 (1990).

14. *Id.*

15. *Stuck v. Pioneer Logging Mach., Inc.*, 279 S.C. 22, 301 S.E.2d 552 (1983).

16. *Leflar, Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 131-32 (1932).

17. See S.C. CODE ANN. § 15-38-20 (Law. Co-op. Supp. 1989).

18. See *Atlantic Coast Line R.R. v. Whetstone*, 243 S.C. 61, 132 S.E.2d 172 (1963).

19. See *McCain Mfg. Corp. v. Rockwell Int'l Corp.*, 695 F.2d 803 (4th Cir. 1982) (applying South Carolina law); *JKT Co. v. Hardwick*, 284 S.C. 10, 325 S.E.2d 329 (Ct. App. 1984). By order issued February 22, 1990, with respect to two cases currently pending before the South Carolina Court of Appeals, *Griffin v. Van Norman and Wiedeman-Singleton, Inc.*, the court has indicated its intention to reconsider its ruling in *JKT Co.*

II. THE LAW OF IMPLIED INDEMNITY

A. General Principles

In *Stuck v. Pioneer Logging Machinery, Inc.*²⁰ the South Carolina Supreme Court explained the basis of implied indemnity. The court stated:

[A] right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join.²¹

In *Stuck* a buyer purchased used harvesting equipment based on the seller's assurance that the equipment was suitable to haul logs.²² In the buyer's first attempt to use the equipment to haul logs, an employee lost control of the truck when the brakes malfunctioned and the truck collided with an oncoming vehicle.²³ After settling a wrongful death claim resulting from the accident, the buyer sought and the trial court awarded indemnity from the seller.²⁴

The supreme court affirmed the lower court's decision, but explained that the award was based strictly on breach of warranties and not on the seller's negligence.²⁵ The court further stated that the action was not based upon any claimed right of indemnity from a joint tortfeasor.²⁶ *Stuck*, therefore, established the relationship required to create a right of implied indemnity between parties. The public policy favoring indemnity when one is placed in a position of liability through no fault of one's own is therefore evident in the *Stuck* decision.

The right of indemnity even will be implied to allow recovery of attorneys' fees when the indemnitee receives a favorable jury verdict.

20. 279 S.C. 22, 301 S.E.2d 552 (1983).

21. *Id.* at 24, 301 S.E.2d at 553.

22. *Id.* at 23, 301 S.E.2d at 552.

23. *Id.*

24. *Id.* at 23-24, 301 S.E.2d at 553.

25. *Id.*

26. *Id.* at 25, 301 S.E.2d at 553. The court explained:

[Buyer's] action is not based on negligence. He asserts that [Seller] is liable on grounds separate from any purported fault of his: [Seller] sold a defective product in an unreasonably dangerous condition, and it breached its warranty that the truck was roadworthy. This action is not based upon any claimed right of indemnity from a joint tortfeasor. Rather, it is an action to recover damages sustained by [Buyer] from [Seller's] failure to ensure the safe condition of the equipment it sold [Buyer]. Under the facts of this case, [Buyer's] failure to discover and correct the latent defects and correct [Seller's] breach of warranties cannot excuse the breach and defeat [Buyer's] claim.

Id. at 24-25, 301 S.E.2d at 553.

In *Addy v. Bolton*,²⁷ a landmark decision on the law of implied indemnity in South Carolina, a building lessee sued the lessor and a general contractor hired by the lessor.²⁸ The plaintiff claimed that the defendants were jointly liable for damages resulting from a fire in the building,²⁹ but the jury returned a verdict against only the general contractor.³⁰ The lessor then filed a cross-claim against the contractor seeking indemnification for attorneys' fees incurred in defense of the action.³¹ The trial court, however, rejected the cross-claim.³²

On the lessor's appeal, the South Carolina Supreme Court ruled that although no judgment was rendered against the lessor, the lessor was entitled to the attorneys' fees.³³ Thus, *Addy* holds that an adverse judgment against the indemnitee in the main action is not a prerequisite for recovering attorneys' fees and costs from the indemnitor.³⁴ Instead, all that is required is a relationship establishing a basis for indemnity implied in law or expressed in contract and no personal fault of the indemnitee.³⁵

The South Carolina Court of Appeals in *JKT Co. v. Hardwick*³⁶ further addressed the appropriateness of awarding attorneys' fees to a victorious indemnitee. The *Hardwick* court considered whether a general contractor and subcontractor could recover attorneys' fees and litigation expenses from a manufacturer-supplier.³⁷ All three parties previously had been sued by a building owner, but only the manufacturer-supplier was held liable to the owner on the main action.³⁸ Accordingly, the contractor and subcontractor each sought indemnity from the supplier for attorneys' fees.³⁹

The circuit court awarded the requested fees, but the court of appeals reversed, finding that both the contractor and the subcontractor

27. 257 S.C. 28, 183 S.E.2d 708 (1971).

28. *Id.* at 32, 183 S.E.2d at 708.

29. *Id.*

30. *Id.* at 32, 183 S.E.2d at 709.

31. *Id.* at 31, 183 S.E.2d at 709.

32. *Id.* at 32, 183 S.E.2d at 709.

33. *Id.* at 34, 183 S.E.2d at 710 (relying on *Atlantic Coast Line R.R. v. Whetstone*, 243 S.C. 61, 70, 132 S.E.2d 172, 176 (1963)).

34. *See id.* 257 S.C. at 34, 183 S.E.2d at 710.

35. *Id.* In *Addy* the implied right to indemnification arose because the indemnitee was compelled to defend a suit in which the indemnitor committed all the harmful acts. *See id.* at 33, 183 S.E.2d at 709.

36. 284 S.C. 10, 325 S.E.2d 329 (Ct. App. 1984). By order issued February 22, 1990, with respect to two cases currently pending before the South Carolina Court of Appeals, *Griffin v. Van Norman and Wiedeman-Singleton, Inc.*, the court has indicated its intention to reconsider its ruling in *JKT Co.*

37. *Id.* at 11, 325 S.E.2d at 330.

38. *Id.* at 12, 325 S.E.2d at 331.

39. *Id.*

incurred the expenses defending their own acts of negligence.⁴⁰ Although the jury ultimately found no liability on the part of either party, both the subcontractor and contractor could have been found liable.⁴¹ Thus, neither the contractor nor the subcontractor was compelled to defend only the acts of the manufacturer-supplier.

The *Hardwick* court specifically distinguished *Addy*, stating that if the defendants in *Addy* had been found liable, "such liability would not have been 'by reason of active participation in the wrong, but constructively because of their relation' to the contractor."⁴² The court of appeals thus further clarified the *Addy* rule: "indemnification for attorney fees and expenses of litigation incurred in the successful defense of a third party's suit may be allowed only if it is clear that the would-be indemnitee would have been entitled to indemnification if found liable."⁴³

Accordingly, a court should examine the original allegations in a complaint in order to determine whether an indemnitee is entitled to indemnity in the event of a judgment.⁴⁴ For example, in *Hardwick* the court reviewed the complaint and held that the negligence charges against the general contractor and subcontractor were independent of the charges against their co-defendant, the manufacturer-supplier.⁴⁵

The *Hardwick* court noted that unlike the case then before it, in *Addy* the defendant-landlords' liability was not based on active participation in the wrong, but on their relation to the contractor.⁴⁶ Thus, the *Hardwick* court explained:

Even though the complaint in *Addy* charged the [landlords] and the contractor with joint and concurrent acts of negligence, this allegation was not conclusive upon whether the [landlords] were in actuality defending against their own alleged wrongful acts. Perhaps because it is a simple matter to draft a complaint charging someone with negligence, the Supreme Court in *Addy* evidently viewed the substance of the complaint and the evidence in the record as an attempt by the [tenants] to impose only vicarious liability upon the lessors.⁴⁷

40. *Id.* at 16, 325 S.E.2d at 333.

41. *See id.*

42. *Id.* at 15, 325 S.E.2d at 332 (quoting *Bell v. Clinton Oil Mill*, 129 S.C. 242, 256, 124 S.E. 7, 12 (1924)).

43. *Id.* at 16, 325 S.E.2d at 333.

44. *See id.* at 13, 325 S.E.2d at 331.

45. *Id.* The complaint's allegations against the general contractor and subcontractor centered on the actual construction of the roof. The allegations against the manufacturer-supplier, on the other hand, centered on supplying defective roof materials. *Id.* at 12, 325 S.E.2d at 330.

46. *Id.* at 15, 325 S.E.2d at 332.

47. *Id.* at 14-15, 325 S.E.2d at 332.

Thus, on the basis of *Addy* and *Hardwick*, if the complaint does not charge the indemnitee with negligence, or if the substance of the complaint and the evidence in the record reflect only an attempt to impose vicarious liability, an indemnity award of attorneys' fees will be allowed even though the indemnitee is successful in defending the suit.⁴⁸

B. *The Active-Passive Rule*

Historically, "[i]ndemnity . . . was more restricted than its modern version. It was permitted only for the benefit of one who *had not actively participated in the wrongdoing*—thus its label as the doctrine of 'active-passive' misconduct."⁴⁹ In other words, under the common law, parties could only seek indemnity from another if they had not actively participated in the commission of the tort.⁵⁰ Conversely, if their involvement was only passive or the result of some contractual relationship, they might be entitled to recover from the active tortfeasor. For example, when a school employee fails to supervise student activities on school property, a school district may nevertheless seek indemnity from a negligent student driver who injures a fellow

48. In determining the amount of fees to be awarded, the court considers, among other things, the time and labor devoted to the case and the prevailing rates for similar services within the community. *See, e.g., Nienow v. Nienow*, 268 S.C. 161, 232 S.E.2d 504 (1977); *Bentrim v. Bentrim*, 282 S.C. 333, 318 S.E.2d 131 (Ct. App. 1984). For standards relating to the award of attorneys' fees within the Fourth Circuit, see *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978).

49. Ferrini, *The Evolution from Indemnity to Contribution—A Question of the Future, If Any, of Indemnity*, 59 CHI. B. REC. 254, 254 (1978) (focusing primarily on Illinois law) (emphasis added).

50. Some jurisdictions continue to draw a distinction between "active" and "passive" liability in deciding the propriety of indemnification. Comment, *Contribution and the Distribution of Loss Among Tortfeasors*, 25 AM. U.L. REV. 203, 210 (1975) (citing *Banks v. Central Hudson Gas & Elec. Corp.*, 224 F.2d 631 (2d Cir.), *cert. denied*, 350 U.S. 904 (1955)). For examples of cases from jurisdictions that still make this distinction, see *American Dist. Tel. Co. v. Kittleson*, 179 F.2d 946, 952 (8th Cir. 1950); *Fidelity & Casualty Co. v. Federal Express, Inc.*, 99 F.2d 681 (6th Cir. 1938); *Seiden v. Savings & Loan Ass'n*, 10 Misc. 2d 720, 172 N.Y.S.2d 403 (N.Y.C. Ct. 1958).

These cases frequently characterize the negligence of the indemnitor as "active," "primary," or "positive" and the negligence of the indemnitee as "passive," "secondary," or "negative." Such characterizations have been criticized as being artificial, lacking objective criteria desirable for predictability in the law, and various rationales have been proposed for allowance of indemnity in such cases. Thus, indemnification of a concurrently negligent tortfeasor is said to be based upon a disparity of duties of care owed by the tortfeasors to the injured party, the doctrine of last clear chance or discovered peril, a disparity of gravity of the fault of the tortfeasors, or a combination of these.

United Airlines, Inc. v. Weiner, 335 F.2d 379, 399 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951 (1965) (footnotes omitted).

student.⁵¹

As late as the early twentieth century, South Carolina courts appeared to apply this active-passive distinction to indemnity cases. In *Bell v. Clinton Oil Mill*⁵² the South Carolina Supreme Court addressed indemnity in the context of a master-servant tort case. The court stated:

Where a tort is committed by a servant under such circumstances as make both him and the master liable, under some circumstances, especially where the master is liable not by reason of active participation in the wrong, but constructively because of his relation, the master frequently has a right of ultimate recovery over [and] against the servant who committed the wrong.⁵³

Thus, the court intimated that masters might not be able to recover if they had participated actively in the wrongdoing.

In *Atlantic Coast Line Railroad v. Whetstone*,⁵⁴ however, the Supreme Court of South Carolina specifically rejected the active-passive analysis, stating:

The *ratio decidendi* of cases granting indemnity has frequently been expressed in such general terms as that . . . the negligence of the indemnitee was merely passive as compared to the negligence of the indemnitor which was active It would seem that such general

51. See *San Mateo Union High School Dist. v. Yamus*, 22 Cal. App. 3d 185, 99 Cal. Rptr. 258 (1971). For other applications of the active-passive test, see *Transcon Lines v. Barnes*, 17 Ariz. App. 428, 498 P.2d 502 (1972); *Florida Power & Light Co. v. General Safety Equip. Co.*, 213 So. 2d 486 (Fla. Dist. Ct. App. 1968) (power company's failure to de-energize its lines or take other action while motorized equipment was being operated near the lines was active negligence precluding recovery of indemnity from equipment manufacturer); *Cason v. Geis Irrigation Co.*, 211 Kan. 406, 507 P.2d 295 (1973) (joint tortfeasor not entitled to indemnity from another merely because one has been less actively negligent); *Adams v. Combs*, 465 S.W.2d 288 (Ky. 1971) (contractor who failed to restore street surface after opening water pipes was actively negligent and not entitled to indemnity from city, which was only passively negligent); *Home Ins. Co. v. Atlas Tank Mfg. Co.*, 230 So. 2d 549 (Miss. 1970) (electrical power company that failed to raise power lines even after it knew that clearance had been decreased by defendant's operations on the land under the power lines was guilty of active negligence); *Rio Grande Gas Co. v. Stahmann Farms, Inc.*, 80 N.M. 432, 457 P.2d 364 (1969) (when utility company and land owner both failed to discover a gas leak from pipe on landowner's property, they were *in pari delicto* and gas company thus was not entitled to indemnity from landowner); *Harmon v. Farmers Mkt. Food Store*, 84 N.M. 80, 499 P.2d 1002 (Ct. App.) (food market operator's negligence in failing to provide safe premises for invitees was active negligence not passive, thereby foreclosing indemnity against delivery truck operators when a cart of groceries fell and struck customer entering store), *cert. denied*, 84 N.M. 77, 499 P.2d 999 (1972).

52. 129 S.C. 242, 124 S.E. 7 (1924) (involving libel and slander).

53. *Id.* at 256-57, 124 S.E. at 12 (emphasis added).

54. 243 S.C. 61, 132 S.E.2d 172 (1963).

propositions . . . will not serve as adequate standards to determine whether or not a tort-feasor guilty of ordinary negligence may recover indemnity against a tort-feasor guilty of gross negligence.⁵⁵

As a result of *Whetstone*, the active-passive analysis will not determine the existence of a right of indemnification in this state.⁵⁶ Nevertheless, two South Carolina cases implicitly have applied the active-passive rule.

In *Stuck v. Pioneer Logging Machinery, Inc.*⁵⁷ the supreme court granted the purchaser a right to indemnity because the purchaser and seller were not joint tortfeasors.⁵⁸ While the court correctly observed that the two technically were not joint tortfeasors, in fact each was guilty of some actionable wrong.⁵⁹ The court did not specifically use the active-passive analysis, but, citing equitable principles, it determined that the seller was guilty of the greater or initial wrong.⁶⁰

The Fourth Circuit came to a similar conclusion when it reversed the district court in *McCain Manufacturing Corp. v. Rockwell International Corp.*⁶¹ In *McCain* a business employee sued the seller and manufacturer of a machine for a physical injury incurred as a result of a defect in the machine. After settling with the manufacturer, the employee agreed to waive his strict liability and warranty claims against the seller as well.⁶² Subsequently, the seller also settled the remaining negligence claim with the employee, after which the seller sued the manufacturer for indemnification.⁶³ Applying the rule of *Whetstone*, the federal district court granted summary judgment to the manufacturer.⁶⁴ It reasoned that since the only cause of action available to the

55. *Id.* at 70, 132 S.E.2d at 176 (citations omitted).

56. *See* South Carolina Elec. & Gas Co. v. Utilities Constr. Co., 244 S.C. 79, 87-88, 135 S.E.2d 613, 616-17 (1964).

57. 279 S.C. 22, 301 S.E.2d 552 (1983).

58. *See id.* at 24-25, 301 S.E.2d at 553. The court cited *Utilities Constr.*, 244 S.C. 79, 135 S.E.2d 613, in support of its decision. *See Stuck*, 279 S.C. at 25, 301 S.E.2d at 553-54. The *Utilities Construction* decision, however, is arguably distinguishable since that court specifically stated that no evidence demonstrated that the indemnitee was personally negligent. *See Utilities Constr.*, 244 S.C. at 88, 135 S.E.2d at 617.

59. The purchaser was found liable in negligence for wrongful death, while the seller was found liable for breach of warranty of roadworthiness. *See Stuck*, 279 S.C. at 23, 301 S.E.2d at 553.

60. The court seemed to determine that, absent the seller's breach of warranty, there would have been no wrongdoing by the purchaser. *See id.* at 23-26, 301 S.E.2d at 553-54.

61. 695 F.2d 803 (4th Cir. 1982) (applying South Carolina law).

62. *McCain Mfg. Corp. v. Rockwell Int'l Corp.*, 528 F. Supp. 524 (D.S.C. 1981), *vacated*, 695 F.2d 803 (4th Cir. 1982).

63. *Id.* at 527.

64. *Id.* at 528-30.

plaintiff against the seller was in negligence, any claim of indemnity would have to be considered as arising out of the seller's negligence.⁶⁵ The district court thus reasoned that indemnity was inappropriate for one who was oneself negligent.⁶⁶

Circumventing *Whetstone*, the Fourth Circuit Court of Appeals reversed the lower court, holding that since any negligence chargeable to the seller was merely passive (mere failure to discover defects), indemnity was appropriate if the seller could show a "contractual or legal relationship."⁶⁷ Thus, the Fourth Circuit applied a traditional active-passive analysis, allowing the indemnity claim to go forward.⁶⁸

Accordingly, *Stuck* and *McCain* appear to apportion blame between active and passive wrongdoers. Neither case, however, expressly overruled or questioned *Whetstone*. Thus, South Carolina courts will probably continue to reject the active-passive rule in form, but utilize the rule in substance.

C. Indemnification in Master-Servant Cases

South Carolina has long recognized that a master is vicariously liable for a servant's torts.⁶⁹ The master's liability, based on principles of respondeat superior, is described in South Carolina as being "derivative and secondary."⁷⁰ The master, however, has a corresponding right to indemnity from a servant who committed the wrong.⁷¹ In theory, these principles seem simple; in practice, however, the existence of insurance often complicates the application of them.

In a simple truck accident in which the master owns the truck and the servant is driving for the master, liability insurance on the truck may insure both the master and the servant: the master as the named insured under the policy and the servant as a permissive user.⁷² Under

65. See *id.* at 529-30.

66. See *id.* at 531.

67. *McCain Mfg. Co. v. Rockwell Int'l Corp.*, 695 F.2d 803, 805-06 (4th Cir. 1982).

68. See *id.* at 806.

69. See, e.g., *Jones v. Elbert*, 211 S.C. 553, 34 S.E.2d 796 (1945); *South Carolina Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 348 S.E.2d 617 (Ct. App. 1986).

70. *Seaboard Air Line R.R. v. Coastal Distrib. Co.*, 273 F. Supp. 340, 342 (D.S.C. 1967) (citing *Mackey v. Frazier*, 234 S.C. 81, 84, 106 S.E.2d 895, 899 (1959)).

71. See *Bell v. Clinton Oil Mill*, 129 S.C. 242, 256, 124 S.E. 7, 12 (1924); see also *supra* text accompanying notes 52-53 (discussing *Bell*). For other cases recognizing this principle, see *Seaboard Air Line R.R.*, 273 F. Supp. 340; *Lankford v. Ryder Truck Sys., Inc.* 41 F.R.D. 430 (D.S.C. 1967). This doctrine has been attacked as subverting the public policy behind *respondeat superior*. See Steffen, *The Employer's "Indemnity" Action*, 25 U. CHI. L. REV. 465, 476-80 (1958).

72. B. MAYBANK, L. BOGGS, R. SHAW, K. SUGGS & J. GRAY, *THE LAW OF AUTOMOBILE INSURANCE* IV-13 (Supp. 1989).

these circumstances, the insurance carrier who paid the loss is foreclosed from indemnity, since the carrier may not subrogate against its own insured.⁷³ Consequently, although a master held liable for a servant's conduct may have a right to indemnity from that servant, the master's indemnity usually is foreclosed by the presence of insurance that covers both master and servant.⁷⁴

III. CONTRACTUAL INDEMNITY

In *South Carolina Electric & Gas Co. v. Utilities Construction Co.*⁷⁵ the South Carolina Supreme Court considered the enforceability of contractual indemnification provisions. In *Utilities Construction* an electric company sought indemnification from an independent contractor for damages the electric company paid to a pedestrian who was injured by falling on a defectively repaired sidewalk.⁷⁶ The contractor alleged that since the electric company negligently failed to discover the defect,⁷⁷ indemnification should not be granted.⁷⁸ The South Carolina Supreme Court held that unlike a suit based upon implied indemnity from a joint tortfeasor, a suit based upon a contractual duty to indemnify could extend to an indemnitee's negligence.⁷⁹ Thus, in *Utilities Construction* the principle of contractual indemnity was recognized as enforceable in South Carolina, even though the indemnitee itself was negligent.

A. Statutory Provisions Governing Contractual Indemnity

South Carolina statutorily prohibits any provision in building and construction contracts purporting to indemnify parties for their own negligence.⁸⁰ Nonetheless, insurance contracts, which inherently are contracts of indemnity whether the coverage is for third-party losses or first-party property, clearly fall within the ambit of contracts permit-

73. *Aetna Casualty & Sur. Co. v. Security Forces, Inc.*, 290 S.C. 20, 24-25, 347 S.E.2d 903, 906 (1986) (subrogated insurer, having paid the loss because of the imputed liability of its named insured (the vehicle operator's employer), could not bring an action later for indemnity for its additional insured (the vehicle operator), even though that operator had separate insurance), *cert. denied*, 481 U.S. 1038 (1987).

74. *Id.*

75. 244 S.C. 79, 135 S.E.2d 613 (1964).

76. *Id.* at 84, 135 S.E.2d at 614-15.

77. *See id.*

78. *See id.* at 90-91, 135 S.E.2d at 618.

79. *See id.*

80. S.C. CODE ANN. § 32-2-10 (Law. Co-op. Supp. 1989); *see infra* text accompanying notes 84-98.

ted by state law.⁸¹ Likewise, the South Carolina version of the Uniform Commercial Code specifically provides for "vouching-in" a party liable to defend and indemnify a downstream seller.⁸²

B. Rules of Construction for Contractual Indemnity Provisions

Generally courts will construe contractual indemnity provisions according to general contract law.⁸³ A contract purporting to indemnify a party for its own negligence, however, will be strictly construed against the party seeking indemnity.⁸⁴ Indeed, most courts will not enforce such a contract unless the intention is expressed in clear and unequivocal terms.⁸⁵

*Murray v. Texas Co.*⁸⁶ exemplifies the line of South Carolina cases requiring an explicit expression of intent to indemnify a party for its own negligence.⁸⁷ In construing the particular indemnity provision in *Murray*, the supreme court stated:

While it is true that the language used in the [indemnity] provision . . . is broad and comprehensive, it is . . . provocative of some doubt.

81. See S.C. CODE ANN. § 38-61-20(A) (Law. Co-op. 1989) (requiring the South Carolina Commissioner of Insurance to review all insurance contracts for legality). In South Carolina, insurance "means a contract whereby one undertakes to indemnify another" *Id.* § 38-1-20(19).

82. The South Carolina Commercial Code provides:

Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

(b) if the claim is one for infringement or the like (subsection (3) of § 36-2-312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.

S.C. CODE ANN. § 36-2-607(5) (Law. Co-op. 1976). For further discussion of the "vouching-in" procedure, see *infra* notes 170-207.

83. *Federal Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989) (citing *Longi v. Raymond-Commerce Corp.*, 34 N.J. Super. 593, 113 A.2d 69 (App. Div. 1955)).

84. *Federal Pac.*, 298 S.C. at 26, 378 S.E.2d at 57.

85. See, e.g., *James F. O'Neil Co. v. United States Fidelity & Guar. Co.*, 381 F.2d 783 (5th Cir. 1967); *American Oil Co. v. Hart*, 356 F.2d 657 (5th Cir. 1966); *Wrobel v. Trapani*, 129 Ill. App. 2d 306, 264 N.E.2d 240 (1970).

86. 172 S.C. 399, 174 S.E. 231 (1934).

87. See *id.* at 402, 174 S.E. at 232.

The defendant [oil company] itself wrote the provision into the contract for its own benefit. It could have plainly stated, if such was the understanding of the parties, that the plaintiff [distributor] agreed to relieve it in the matter from all liability for its own negligence. As it did not do so, we resolve all doubt . . . in favor of the [distributor], and hold that it was not the intent of the parties to give to the contract as written the effect claimed by the [oil] company.⁸⁸

A South Carolina federal district court, however, has declined to apply *Murray* strictly. In *Midland Insurance Co. v. Delta Airlines, Inc.*⁸⁹ the existence of a parallel agreement to insure, among other factors, led the court to conclude that the contract provision should be construed in favor of the indemnitee.⁹⁰ Other South Carolina federal courts, however, consistently have held that contractual indemnity for an indemnitee's own negligent acts will be granted only when the contract expresses this intention in unequivocal terms.⁹¹

In summary, except in the context of building and construction contracts,⁹² South Carolina public policy currently permits contracts of indemnity covering the indemnitee's own negligence. Although such agreements will be strictly construed against the purported indemnitee, they are both permissible and commonplace as an allocation of risk between contracting parties with equal bargaining power.⁹³

Contractual indemnity clauses should be distinguished from exculpatory clauses, which limit the remedies available to one party to a contract against the other.⁹⁴ Although an indemnity clause may have the same effect as an exculpatory clause,⁹⁵ it goes much further. An

88. *Id.* at 402-03, 174 S.E. at 232.

89. 530 F. Supp. 190 (D.S.C. 1982).

90. In *Midland*, the lessee and manufacturer of a cargo container were sued by the estate of a longshoreman who was killed as a result of the container shifting while aboard a vessel. *Id.* at 191. The lessee and manufacturer cross-claimed against one another for indemnification. *Id.* The lease agreement between the lessee and manufacturer included, *inter alia*, the lessee's agreement to indemnify the manufacturer for damages arising from the container's use and to procure insurance covering such hazards. *Id.* at 191-92. The district court considered a number of factors, including the insurance provision, in ruling in favor of the manufacturer. In the court's analysis, the parties' intent that the risk be insured was sufficient to overcome the presumption against indemnifying a party for its own negligence. *Id.* at 195.

91. See, e.g., *Shealy v. Southern Ry.*, 287 F. Supp. 713, 714 (D.S.C. 1968); *Cox v. E.I. Du Pont de Nemours & Co.*, 39 F.R.D. 47 (W.D.S.C. 1965).

92. See *infra* text accompanying notes 99-118.

93. See *Pride v. Southern Bell Tel. & Tel. Co.*, 244 S.C. 615, 621-22, 138 S.E.2d 155, 158 (1964) (discussing whether roughly equal bargaining power between parties is a prerequisite to an effective exculpatory clause).

94. *Id.* (contract limiting damages for breach).

95. For an example of a contract containing both exculpatory and indemnity clauses, see *Murray v. Texas Co.*, 172 S.C. 399, 174 S.E. 231 (1934).

indemnity clause covers any expenses sustained in the defense of the action in addition to the liability the indemnitor owes the indemnitee.⁹⁶ An exculpatory clause, on the other hand, merely apportions liability between two contracting parties without affecting the relation of those parties to third persons who might bring an action.⁹⁷ Like contractual indemnity, however, exculpatory clauses also will be strictly construed against the party seeking to avoid liability.⁹⁸

C. Specific Types of Contractual Indemnity Provisions

1. Construction Contracts

By statute, South Carolina limits a party's right to indemnity in a construction contract. Section 32-2-10 of the South Carolina Code provides:

Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable.⁹⁹

Although enacted in 1980, this statutory indemnity provision has not yet been construed by the courts of South Carolina. Facially, the statute forecloses a party's right of indemnity in a construction contract from a contractor or subcontractor for liability incurred because

96. *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971).

97. *See, e.g., United States v. Rogers & Rogers*, 161 F. Supp 132 (S.D. Cal. 1958).

The court stated:

"The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm."

Id. at 135 (quoting *Biakanja v. Irving*, 49 Cal. 2d 647, 650, 320 P.2d 16, 19 (1958)).

98. *See Federal Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 28, 378 S.E. 2d 56, 58 (Ct. App. 1989); *South Carolina Elec. & Gas Co. v. Combustion Eng'g, Inc.*, 283 S.C. 182, 191, 322 S.E.2d 453, 458 (Ct. App. 1984).

99. S.C. CODE ANN. § 32-2-10 (Law. Co-op. Supp. 1989).

of the "sole negligence" of the promisee.¹⁰⁰ The use of the term "sole negligence" arguably implies that when a party is jointly negligent a contractual right to indemnity may not violate public policy and therefore may be enforceable.

The South Carolina statute substantially parallels the law of other states. For example, Illinois,¹⁰¹ Michigan,¹⁰² and New Mexico¹⁰³ also have statutes that limit the right of indemnification of parties who are solely negligent. Of these three states, Illinois and New Mexico also expressly foreclose the right of indemnity when the parties are jointly negligent.¹⁰⁴

The Michigan statute, like the South Carolina statute, does not address tortfeasors who are jointly negligent.¹⁰⁵ Thus, the case of *Trim v. Clark Equipment Co.*,¹⁰⁶ construing the Michigan statute, may offer guidance to the South Carolina courts. In *Trim* the indemnitor contracted with the indemnitee to install a sprinkler system. The contract provided that the indemnitee would be entitled to indemnity "regardless of whether such claim [was] alleged to be caused, in whole or in part, by negligence or otherwise, on the part of the [indemnitee] or its employees."¹⁰⁷ While the contract was in effect, two workers were injured and sued the indemnitee for damages.¹⁰⁸ The indemnitor refused to honor the indemnification agreement, requiring the indemnitee to bring a third-party complaint after settling the injured workers' claims.¹⁰⁹

Confronting the issue of whether the statute, which prevented indemnity for the indemnitee's sole negligence, voided the entire indem-

100. *Id.*

101. ILL. ANN. STAT. ch. 29, para. 61 (Smith-Hurd Supp. 1989).

102. MICH. COMP. LAWS ANN. § 691.991 (West 1987).

103. N.M. STAT. ANN. § 56-7-1 (1978).

104. See ILL. ANN. STAT., ch. 29, para. 61 (Smith-Hurd Supp. 1989); N.M. STAT. ANN. § 56-7-1 (1978).

105. See MICH. COMP. LAWS ANN. § 691.991 (West 1987). The Michigan statute provides:

A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.

Id.

106. 87 Mich. App. 270, 274 N.W.2d 33 (1978).

107. *Id.* at 273, 274 N.W.2d at 34.

108. *Id.* at 274, 274 N.W.2d at 35.

109. *Id.* at 273-75, 274 N.W.2d at 34-35.

nification agreement,¹¹⁰ the Michigan court concluded that the statute voided only portions of contracts indemnifying the indemnitee for its own negligence.¹¹¹ The indemnitor, in effect, had made two separate promises: to indemnify for the indemnitee's sole negligence and to indemnify for injury caused in part by his negligence.¹¹² Although both promises were supported by the same consideration, the court concluded that the statute voided only the first promise; the second promise was enforceable, even if the indemnitee was personally responsible for the injury.¹¹³ Accordingly, the court severed the illegal promise and allowed the rest of the clause to stand.¹¹⁴

Subsequent Michigan cases have followed the *Trim* analysis,¹¹⁵ and it should be applied to the similar South Carolina statute. Because both statutes only proscribe indemnification for an indemnitee's sole negligence, any other promise of indemnity remaining in the contract is presumptively valid or, alternatively, should at least be analyzed separately.

In fact, based on *Johnson v. South State Insurance Co.*,¹¹⁶ the South Carolina Supreme Court probably would apply a similar analysis. In *Johnson* the court held that contracts generally should be enforced to the extent possible, even if certain portions of the contract are invalid or declared void as against public policy.¹¹⁷ The court concluded that if one party to an insurance contract commits fraud relating to a specific clause in the contract, the portions of the contract that are untouched by the fraud remain in effect and are enforceable.¹¹⁸ Consequently, indemnity provisions in construction contracts may well be enforceable in South Carolina to the extent that they do not conflict with the rule preventing indemnity for the indemnitee's sole negligence.

2. *Insuring the Indemnity Agreement*

Indemnity clauses or contracts frequently are required in standard contracts. For example, a shipper may require indemnification from a

110. See *id.* at 275, 274 N.W.2d at 35.

111. See *id.* at 276, 274 N.W.2d at 36.

112. *Id.*

113. *Id.*

114. *Id.*

115. See *Harbensi v. Upper Peninsula Power Co.*, 118 Mich. App. 440, 325 N.W.2d 785 (1982); *Peeples v. City of Detroit*, 99 Mich. App. 285, 297 N.W.2d 839 (1980); *Robinson v. A.Z. Shmina & Sons Co.*, 96 Mich. App. 644, 293 N.W.2d 661 (1980).

116. 288 S.C. 239, 341 S.E.2d 793 (1986).

117. *Id.* at 242, 341 S.E.2d at 794.

118. *Id.* at 241, 341 S.E.2d at 794.

common carrier for any liability accruing because of the carriage, or an owner may require indemnification from a general contractor for injuries to third persons venturing onto the construction site. To meet these business needs, parties often purchase insurance coverage to satisfy the obligations under the indemnity agreement. Such contractual liability coverage, however, is not automatically covered by a liability insurance policy. For that reason, when insurance is intended to satisfy the obligations of an indemnity agreement, parties must be sure the required coverage is actually provided.

The typical liability insurance policy contains a standard contractual liability exclusion.¹¹⁹ To avoid this exclusion and to insure an assumption of contractual liability, the insured usually purchases contractual liability coverage by endorsement.¹²⁰ The typical endorsement provides in relevant part:

The Company will pay on behalf of the insured all sums which the insured, by reason of contractual liability assumed by him under a contract designated in the schedule for this insurance, shall become legally obligated to pay as damages because of . . . bodily injury or . . . property damage to which this insurance applies, caused by an occurrence¹²¹

Consequently, the provision of contractual liability coverage by endorsement hinges on the actual definition of "contractual liability." The typical policy defines that term to mean "liability expressly assumed under a written contract or agreement."¹²²

Although no South Carolina court has interpreted the meaning of contractual liability, other jurisdictions considering this issue have con-

119. The usual exclusion clause reads:

This insurance does not apply: to liability assumed by the *insured* under any contract or agreement except an *incidental contract*; but this exclusion does not apply to a warranty of fitness or quality of the *named insured's products* or a warranty that work performed by or on behalf of the *named insured* will be done in a workmanlike manner.

Annotated Comprehensive General Liability Insurance Policy, 1984 DEF. RES. INST. 67 (emphasis in original).

An incidental contract typically is defined in the policy language of general liability policies as follows:

"*Incidental contract*" means any written (1) lease of premises, (2) easement agreement, except in connection with construction or demolition operations on or adjacent to a railroad, (3) undertaking to indemnify a municipality required by municipal ordinance, except in connection with work for the municipality, (4) sidetrack agreement, or (5) *elevator* maintenance agreement.

Id. at 23 (emphasis in original).

120. *See id.* at 23.

121. *Id.* at 98 (emphasis added).

122. *Id.*

cluded that a contract need not be signed to be a written agreement.¹²³ The contract, however, must specifically provide for indemnity. In *J.L. Simmons Co. v. Fidelity & Casualty Co.*¹²⁴ the court could not find an identifiable indemnity provision in the contract despite a variety of contractual undertakings, such as the obligation to exercise precaution for the protection of persons and property, to observe safety provisions, and other agreements with an owner.¹²⁵ The court concluded that, at best, such undertakings raised an implied agreement to indemnify, but failed as contractual indemnity, since liability was not expressly assumed under a written contract or agreement.¹²⁶

Accordingly, parties should obtain a contractual liability endorsement in conjunction with the original clause in the contract excluding contractual liability. By doing so, an insured receives coverage for all written or expressed assumption of liability as well as a right to indemnity for any incidental contract defined in the original exclusion.¹²⁷ This added coverage is significant because the contractual liability coverage endorsement requires that the contract be designated in the schedule for the insurance. Consequently, an insured who fails to designate an assumption of liability by contract under the insurance schedule places himself outside the contractual liability coverage and under the standard exclusionary language.¹²⁸

3. Railroad Sidetrack Agreements

Railroad sidetrack agreements¹²⁹ frequently include a clause requiring the industrial party to hold the railroad harmless for any

123. See, e.g., *Travelers Ins. Co. v. Chicago Bridge & Iron Co.*, 442 S.W.2d 888 (Tex. Ct. App. 1969). In *Travelers* the parties had agreed to sign a printed form agreement containing an indemnity provision, but the agreement had not been signed when the accident occurred. *Id.* at 892-97. The court held that as a matter of law the agreement was "a written contract" as contemplated by the contractual liability coverage endorsement. *Id.* at 898.

124. 511 F.2d 87 (7th Cir. 1975).

125. *Id.* at 89.

126. *Id.* at 89-90 (indemnity agreement can only "be effected by some identifiable provision purporting to be an assumption of liability, or a promise to indemnify or hold harmless from liability").

127. The coverage grant for incidental contracts is not limited by the endorsement for contractual liability. See *supra* note 119 (language of typical exclusion).

128. For an extensive discussion of the contractual liability exclusion, see *J.L. Simmons Co.*, 511 F.2d at 90-92.

129. Railroad companies use a railroad sidetrack agreement to provide switches, spurs, or "sidetracks" on privately owned land (typically on the property of industrial plants) for easy access to transportation. See Annotation, *Construction and Effect of Liability Exemption or Indemnity Clause in Spur Track Agreement*, 20 A.L.R.2d 711, 712-13 (1951).

loss.¹³⁰ The sidetrack indemnity clause generally is interpreted in accordance with ordinary rules of contract construction.¹³¹ The intention of the parties, as evidenced by the contract's wording, is followed as closely as possible.¹³² Further, the actionable negligence of the railroad does not affect the applicability of a sidetrack indemnity clause.¹³³ If the industry agreed to indemnify the railroad for the latter's negligence, the provision is enforceable.¹³⁴

In interpreting sidetrack indemnity clauses, South Carolina courts have followed these general principles. In *Peoples Oil & Fertilizer Co. v. Charleston & Western Carolina Railway*¹³⁵ the court considered whether the industry had agreed to hold the railroad harmless for damages resulting from fire starting on the main track and spreading to the sidetrack.¹³⁶ Construing the parties' intent from the language of the clause, the court held that damages from fire or any portion of the track furnished by the railroad were the railroad's responsibility.¹³⁷

More recently, the Fourth Circuit Court of Appeals reiterated the importance of examining the parties' intent in cases in which the railroad was negligent. In *Southern Railway v. Springs Mills, Inc.*¹³⁸ the appellant industry claimed it had no responsibility to indemnify the railroad for money that the railroad paid in damages to a brakeman injured when he was struck by an unsecured gate across land clearance given by the industry. The gate had not been properly locked open by

130. See *id.* at 713.

131. See *id.*; see also *supra* text accompanying notes 83-98 (discussing rules of construction).

132. See Annotation, *supra* note 129, at 713-14.

133. See *id.*; see also *John P. Gorman Coal Co. v. Louisville & N.R.R.*, 213 Ky. 551, 281 S.W. 487 (1926) (contract effectively insuring against railway's negligence held not against public policy).

134. See, e.g., *Buckeye Cotton Oil Co. v. Louisville & N.R.R.*, 24 F.2d 347 (6th Cir. 1928); *Watkins v. Baltimore & O.R.R.*, 29 F. Supp. 700 (W.D. Pa. 1939); *Louisville & N.R.R. v. Atlantic Co.*, 66 Ga. App. 791, 19 S.E.2d 364 (1942); *Terminal Ry. Ass'n v. Ralston-Purina Co.*, 352 Mo. 1013, 180 S.W.2d 693 (1944).

135. 83 S.C. 530, 65 S.E. 733 (1908).

136. See *id.* at 532-33, 65 S.E. at 734. The hold harmless agreement provided: [Plaintiff] covenants and agrees that it will . . . contract to release [Defendant] of all damages resulting from fire from locomotives while upon the spur track, or originating on the right of way hereby agreed to be furnished by [Plaintiff], unless [Plaintiff] can show that the same resulted from the negligence of [Defendant], its agents or employees, in the lawful discharge of their duties.

Id.

137. See *id.*; accord *Fraser-Patterson Lumber Co. v. Southern Ry.*, 79 F. Supp. 424 (W.D.S.C. 1948); *Mayfield v. Southern Ry.*, 85 S.C. 165, 67 S.E. 132 (1910).

138. 625 F.2d 496, 498 (4th Cir. 1980)

a railroad employee.¹³⁹ In examining an indemnity clause specifically covering the clearance,¹⁴⁰ the court found that the industry clearly intended to absolve the railroad of *any* liability incurred in connection with the clearances, even liability resulting from the latter's own negligence.¹⁴¹

In *Palmetto Lumber Co. v. Southern Railway*¹⁴² the South Carolina Supreme Court stated that willful conduct was beyond the purview of an indemnity clause reimbursing the railroad for its own negligence, since the ordinary definition of negligence does not include willful and wanton conduct.¹⁴³ Accordingly, when the conduct is willful, the railroad will have no right of indemnity, even though the clause may indemnify the railroad for its own negligence.

4. Lease Provisions

The landlord-tenant relationship raises several indemnification issues.¹⁴⁴ For example, in *Federal Pacific Electric v. Carolina Production Enterprises*,¹⁴⁵ Federal Pacific sought indemnification from its tenant, Carolina Production, and the tenant's insurer for the litigation expenses incurred in defending a personal injury suit brought against Federal Pacific.¹⁴⁶ Federal Pacific rented an industrial plant to Carolina Production. After Carolina Production took over, an explosion oc-

139. *Id.* at 497.

140. The indemnity clause stated:

[Appellant] will, moreover, indemnify and save harmless the Railway Company from and against the consequences from any loss of life, personal injury, or property loss or damages which may be caused by, result from, or arise by reason of or in connection with, any limited or restricted clearances for said industrial track.

Id. at 497 (footnote omitted).

141. *See id.* at 498. The court also based its holding on the existence of an earlier indemnity clause between the parties already holding the railroad harmless for the industry's negligence. The court stated that "the special indemnity provision in the supplemental agreement would be superfluous if limited to indemnification by Springs Mills only for its own negligent acts." *Id.*

142. 154 S.C. 129, 151 S.E. 279 (1929).

143. *See id.* at 137-38, 151 S.E. at 281-82. The court, however, found no evidence of willful conduct by the railroad, so the statement is essentially dictum. *See id.* at 138; 151 S.E. at 282. *But see* Salley Oil Mill v. Southern Ry., 108 S.C. 131, 93 S.E. 336 (1917) (allegations of willfulness in complaint insufficient to overcome railroad's defense of indemnity clause in agreement with its lessee).

144. *See, e.g.,* Olson v. Schultz, 67 Minn. 494, 70 N.W. 779 (1897) (landlord liable to indemnify tenant for judgment paid to third party in personal injury case arising from landlord's breach of duty to repair); *see also* 41 AM. JUR. 2D *Indemnity* § 848 (1968).

145. 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989).

146. *See id.*

curred on the premises, and three persons were injured. One victim and the spouse of another sued Federal Pacific in negligence, strict liability, and implied warranty, but Carolina Production was not named a defendant.¹⁴⁷

Federal Pacific filed an action against Carolina Production based upon certain provisions in the lease,¹⁴⁸ contending that Carolina Production had agreed to indemnify Federal Pacific for any loss during the lease term. The court of appeals disagreed. First, the court recognized that a contractual provision relieving one party of liability for its negligence must be unequivocally spelled out and strictly construed against the indemnitee.¹⁴⁹ The court then considered the efficacy of an indemnity provision providing for the relief from liability for "any and all claims."¹⁵⁰

Ultimately, the court based its decision on *Murray v. Texas Co.*¹⁵¹ and held that the South Carolina Supreme Court would not permit Federal Pacific to evade liability by the terms of the contract provisions. The court explained:

As in *Murray*, the language employed by the indemnity provision in the instant case is also broad and comprehensive and is provocative of some doubt; and since the indemnity provision was inserted for Federal Pacific's benefit and Federal Pacific seeks to use the provision to

147. See *id.* at 25-26, 378 S.E.2d at 55-57.

148. The relied-upon provisions read as follows:

15. *Landlord Released From Liability*. In no event shall [Federal Pacific] be liable for any injury or damage to persons or property for any reason in connection with the Leased Premises.

16. *Indemnification by Tenant and Liability Insurance*. [Carolina Production] shall indemnify [Federal Pacific] and hold it harmless from and against any damage suffered or liability incurred on account of bodily injury to any person or persons . . . or any loss or damage of any kind in connection with the Leased Premises during the term of this lease. This shall include the expense of reasonable attorney's fees.

[Carolina Production], at its sole cost and expenses and for the benefit of [Carolina Production], shall obtain and keep in full force and effect during the original term or extension and/or renewal thereof comprehensive public liability insurance . . . protecting [Carolina Production] against any and all liability arising out of, based upon or in connection with injury to or the death of any person or persons or damage to property in or about the premises.

Id. at 25, 378 S.E.2d at 57 (ellipses original).

149. *Id.* at 26, 378 S.E.2d at 57; see *supra* text accompanying notes 83-98.

150. *Id.* at 26-27, 378 S.E.2d at 57 (citing *University Plaza Shopping Center, Inc. v. Stewart*, 272 So. 2d 507, 511 (Fla. 1973) ("any and all claims" language insufficient to authorize indemnity in suit arising from lease agreement)); see also 41 AM. JUR. 2D *Indemnity* § 15 (1968); Annotation, *Tenant's Agreement to Indemnify Landlord Against All Claims as Including Losses Resulting from Landlord's Negligence*, 4 A.L.R.4TH 798, 802 (1981).

151. 172 S.C. 399, 174 S.E. 231 (1934).

absolve itself from liability for its own negligence, that doubt should be resolved in favor of Carolina Production.¹⁵²

Thus, the lease term lacked the specificity required to allow Federal Pacific to recover indemnity for its own negligence.

Leases raise other issues of indemnity as well. For example, in other jurisdictions, if a tenant assigns a lease, he has a duty to ensure that the assignee performs the tenant's covenants running with the land.¹⁵³ If the assignee fails to perform the obligations such as payment of taxes or rent to the landlord, the tenant must perform them. The tenant, however, has a concomitant right to seek indemnification for those losses from the assignee.¹⁵⁴ This right, whether arising from contract or by operation of common law, is not affected by *Federal Pacific*, since the right involves no implication of fault, but merely exists to apportion loss.

IV. INDEMNITY RELATED TO GOVERNMENTAL UNITS

Due to the unique status of governmental agencies, difficult indemnity issues arise when the government is a party. Generally, both federal and local governmental units can recover indemnity from other tortfeasors if certain conditions are met.

A municipality generally can recover indemnity from another for damages paid in a tort suit, provided the other is primarily responsible for the negligence that caused the injury.¹⁵⁵ Typically, plaintiffs who have sustained injuries due to an obstruction, defect, or excavation in a sidewalk, street, or highway attempt to recover compensation from the municipality. The municipality then seeks indemnity from the third-party tortfeasor who was primarily liable for the plaintiff's injuries.¹⁵⁶ Further, the municipality has a right to indemnity even though it consented to the operations that caused the defects or obstruction.¹⁵⁷ Thus, a municipality maintains its right to indemnity even though the wrongdoer may be an independent contractor engaged by the municipality to perform certain activities.¹⁵⁸

Similarly, when the United States government is sued under the Federal Tort Claims Act (FTCA), it may be eligible for indemnifica-

152. *Federal Pac.*, 298 S.C. at 28, 378 S.E.2d at 58.

153. See 49 AM. JUR. 2D *Landlord and Tenant* § 429 (1970).

154. *Id.*

155. See 42 C.J.S. *Indemnity* § 23 (1944 & Supp. 1989). But see *supra* notes 49-68 (discussing the active-passive rule).

156. 42 C.J.S. *Indemnity* § 23 (1944 & Supp. 1989).

157. *Id.* § 22.

158. See *South Carolina Elec. & Gas Co. v. Combustion Eng'g, Inc.*, 283 S.C. 182, 322 S.E.2d 453 (Ct. App. 1984).

tion. As with municipal indemnity,

if the tortfeasor from whom indemnity is sought is the one primarily responsible, through its active or primary negligence, for the tort for which the United States is charged with liability under the Federal Tort Claims Act, the United States is entitled to indemnity if its own negligence was only passive or secondary.¹⁵⁹

The above-stated principles of law are applicable in determining the United States government's right to indemnity in the absence of a contract. When the United States government claims a right of contractual indemnity, however, federal law provides the rule of decision.¹⁶⁰ For example, the United States, even as a joint tortfeasor, may be entitled to indemnity from a contractor if the contract required the contractor to indemnify the government for any damage claims.¹⁶¹ Similarly, when a contract holds a contractor responsible for damages resulting from his negligence in performing the contract, the "United States [is] entitled to recover indemnity to the extent that the contractor's negligence contributed to the employee's" injuries.¹⁶² On the other hand, when a contract only provides for indemnity claims or liabilities arising out of the *use or operation* of the product or equipment during the performance of the contract, the United States may not recover indemnity from the contractor for liability resulting from its own negligence.¹⁶³ Moreover, even if express conditions as to liability do not exist in the contract, the United States still may be entitled to indemnification. For example, a contractor has an *implied* obligation to indemnify the government in some cases.¹⁶⁴

159. Annotation, *Right of United States Under Federal Tort Claims Act to Recover Contribution or Indemnity from Joint Tortfeasor*, 15 A.L.R. FED. 665, 677 (1973); see also *United States v. Savage Truck Line, Inc.*, 209 F.2d 442 (4th Cir. 1953), *cert. denied*, 347 U.S. 952 (1954) (when government airplane engine fell from truck killing driver of another vehicle, court held that United States should be indemnified by common carrier who had negligently loaded the engines into its truck).

160. See Annotation, *supra* note 159, at 688-90.

161. *Id.* at 690-92.

162. *Id.* at 694.

163. See *id.* at 692-94; see also *Migias v. United States*, 167 F. Supp. 482 (W.D. Pa. 1958) (government negligent in permitting contractor to use scaffold which was old and dangerous for intended use).

164. For a more thorough discussion of indemnity under the Federal Tort Claims Act, see Annotation, *Right of United States Under Federal Tort Claims Act to Recover Contribution or Indemnity from Joint Tortfeasor*, 15 A.L.R. FED. 665 (1979); Annotation, *Federal Employees' Compensation Act (5 USCS §§ 8101 et. seq.) as Affecting Recovery Under Federal Tort Claims Act*, 43 A.L.R. FED. 424 (1979).

V. INDEMNIFICATION OF CORPORATE DIRECTORS

Recently revised provisions of the South Carolina Corporate Code on indemnity for corporate officers¹⁶⁵ highlight the relationship between the corporation and its officials. Under section 33-8-510, a corporation may indemnify a director who is a party to a lawsuit in his official capacity as long as certain conditions are met.¹⁶⁶ Other sections prescribe mandatory indemnity¹⁶⁷ and indemnity for officers, employees, and agents of a corporation.¹⁶⁸ Thus, by meeting defined prerequisites, corporate directors or officers can transfer losses incurred simply by virtue of a position with the corporation to the entity which ought to bear them—the corporation. By providing a mechanism for corporations to fund the losses of corporate directors, the corporate indemnity statute presupposes the necessary relational elements—in this in-

165. See S.C. CODE ANN. §§ 33-8-500 to -580. (Law. Co-op. 1990).

166. See *Id.* § 33-8-510. This section provides:

(a) Except as provided in subsection (d), a corporation may indemnify an individual made a party to a proceeding because he is or was a director against liability incurred in the proceeding if:

(1) he conducted himself in good faith; and
(2) he reasonably believed:

(i) in the case of conduct in his official capacity with the corporation, that his conduct was in its best interest; and

(ii) in all other cases, that his conduct was at least not opposed to its the best interest; and

(3) in the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful.

(b) A director's conduct with respect to an employee benefit plan for a purpose he reasonably believed to be in the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirement of subsection (a)(2)(ii).

(c) The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of *nolo contendere* or its equivalent is not, of itself, determinative that the director did not meet the standard of conduct described in this section.

(d) A corporation may not indemnify a director under this section:

(1) in connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or

(2) in connection with any other proceeding charging improper personal benefit to him, whether or not involving action in his official capacity, in which he was adjudged liable on the basis that personal benefit was improperly received by him.

(e) Indemnification permitted under this section in connection with a proceeding by or in the right of the corporation is limited to reasonable expenses incurred in connection with the proceeding.

Id.

167. See *id.* § 33-8-520.

168. See *id.* § 33-8-560.

stance, the corporation's responsibility to those performing functions in its name.¹⁶⁹

VI. "VOUCHING-IN": THE UNIFORM COMMERCIAL CODE VOUCHER TO WARRANTY

Closely analogous to the basic principles of implied indemnification, the Uniform Commercial Code (U.C.C.) permits a buyer sued in breach of warranty or other obligation to "vouch-in" his seller when the seller is liable for a claim against the buyer.¹⁷⁰ This provision, adopted by the vast majority of the states,¹⁷¹ raises important issues of liability, since courts generally have extended the "vouching-in" principle exemplified in the Code from the basic breach of warranty specified in the statute to the seller's negligence¹⁷² and to strict liability in tort.¹⁷³

This provision of the Code is generally recognized as a codification of the common-law procedure of "vouching-in."¹⁷⁴ As stated by one court:

The statute permits a buyer, who is sued for breach of warranty or other obligation for which his seller is answerable over, to bind the seller in the action against the buyer if the buyer gives the seller written notice of the litigation and the notice tenders defense of the litigation to the seller.¹⁷⁵

Although vouching-in of a buyer's seller does not eliminate the neces-

169. H. NEMM, *HANDBOOK ON THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES*, § 380 (2d ed. 1970).

170. See S.C. CODE ANN. § 36-2-607(5)(a) (Law. Co-op. 1976). This section provides: Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after reasonable receipt of the notice does come in and defend he is so bound.

Id.

171. See State Correlation Tables, U.C.C. Rep. Serv. (Callaghan) (Supp. 1989). Forty-nine states have adopted this provision of the Uniform Commercial Code without alteration. *Id.*

172. See, e.g., *Altec, Inc. v. FWD Corp.*, 399 F.2d 860 (5th Cir. 1968).

173. See, e.g., *Smith Radio Communications, Inc. v. Challenger Equip., Ltd.*, 270 Or. 322, 527 P.2d 711 (1974).

174. See *International Harvester Co. v. TRW, Inc.*, 107 Idaho 1123, 695 P.2d 1262 (1985).

175. *Contractor's Lumber & Supply Co. v. Champion Int'l Corp.*, 463 So. 2d 1084, 1086 (Miss. 1985).

sity of the second lawsuit if the vouchee-seller declines to defend, the vouchee-seller will be bound to any determination of fact that is common to the two lawsuits.¹⁷⁶ Because of this *res judicata* effect, the vouching-in procedure aids a downstream retailer of a product when a customer makes it a defendant in a lawsuit.

Third-party practice under Rule 14 of both the Federal¹⁷⁷ and South Carolina¹⁷⁸ Rules of Civil Procedure complements the vouching-in procedure. Essentially, Rule 14 impleader provisions permit the second lawsuit anticipated under the vouching-in procedure to be part of the very same lawsuit in which the downstream retailer faces liability. Thus, impleader expedites the process by which the vouching-in procedure is accomplished.¹⁷⁹ Impleader may result in acceleration of a claim even when the right is inchoate.¹⁸⁰

Impleader, however, may not always be available for vouching-in, since jurisdictional issues¹⁸¹ or problems in serving a third party may

176. See *Moldex, Inc. v. Ogden Health Prods.*, 489 N.E.2d 130, 132 (Ind. Ct. App. 1986); *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 177 Ind. App. 508, 380 N.E.2d 571 (1978).

177. FED. R. CIV. P. 14.

178. S.C.R. CIV. P. 14.

179. See e.g., *Handel-Maatschappij H. Albert de Bary & Co. v. Faradyne Elec. Corp.*, 37 F.R.D. 357 (S.D.N.Y. 1964).

180. *Bosin v. Minneapolis, St. P. & S. Ste. M. Ry.*, 183 F. Supp. 820 (E.D. Wisc. 1960), *aff'd sub nom. Minneapolis, St. P. & S. Ste. M. Ry. v. City of Fond du Lac*, 297 F.2d 583 (7th Cir. 1961); see also *Glens Falls Indem. Co. v. Atlantic Bldg. Corp.*, 199 F.2d 60, 63 (4th Cir. 1952). In *Glens Falls* the court stated:

It is true in South Carolina and elsewhere that the right of subrogation may not be recognized unless the party asserting it has paid the debt on which the right of subrogation is based. But this rule applies when the indemnitor brings a separate suit against the person whose action has caused the loss. Rule 14 was designed to prevent this circuitry of action and to enable the rights of an indemnitee against an indemnitor and the rights of the latter against a wrongdoer to be finally settled in one and the same suit. It is generally held that it is no obstacle to a third party action that the liability, if any, of the third party defendant can be established only after that of the original defendant and after the satisfaction of the plaintiff's claim, where subrogation is the basis of the claim.

Id. at 63 (citation omitted).

181. Unlike third-party practice under Rule 14, the vouching-in rule applies without reference to jurisdiction and remains a viable procedure even when the original seller is not subject to service of process for personal jurisdiction. See, e.g., *Peter Eckrich & Sons, Inc.*, 365 U.S. 260 (1961) (a vouchee does not by its defense of the case subject itself to the court's jurisdiction nor thereby waive any venue requirements that might otherwise exist); see also *Travelers Indem. Co. v. Evans Pipe Co.*, 432 F.2d 211 (6th Cir. 1970) (vouchee bound by determinations of fact and law in previous state action); *Hessler v. Hillwood Mfg. Co.*, 302 F.2d 61 (6th Cir. 1962) (vouchee who failed to defend in purchaser's case against retailer was bound by prior court's findings against retailer).

present obstacles.¹⁸² This latter difficulty results when the third-party complaint is not initiated within ten days after service of the original answer¹⁸³ or when the court, in its discretion, denies the motion to join a third party.¹⁸⁴

Nevertheless, this limitation should not deter litigants from using the U.C.C. vouching-in procedure, since the original action becomes res judicata for any future actions against the seller if the seller declines to defend the original suit.¹⁸⁵ Determining the extent of the original action's preclusive effect on the second lawsuit will depend on several factors. First, the seller is bound only by issues of fact common to the two suits.¹⁸⁶ Likewise, the two suits must share the same underlying factual premises.¹⁸⁷ Thus, if the damages result from the seller's failure or refusal to repair the goods rather than from a manufacturing defect in the goods, the seller has no right to indemnity against the manufacturer for breach of warranty.¹⁸⁸ If the party establishes that the product was not altered by the intermediate seller or improperly repaired, however, a basis for vouching-in and ultimate indemnity against the upstream seller exists.¹⁸⁹

For example, in *Black v. Don Schmid Motor, Inc.*¹⁹⁰ a jury was presented with the question of whether Peugeot Motors had breached its implied warranty of merchantability to its dealer, thereby making it answerable to the dealer for the dealer's liability to the plaintiff. The appellate court determined that the trial judge's instructions to the jury were proper when he charged that "Peugeot Motors is liable to [the dealer] for inherent defects in the vehicle, but not [for the dealer's] failure to properly repair the vehicle."¹⁹¹

To vouch-in successfully, the procedure provided for by the stat-

182. See 3 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 14.05 (2d ed. 1989).

183. See FED. R. CIV. P. 14(a); S.C.R. CIV. P. 14(a).

184. See FED. R. CIV. P. 14(a); S.C.R. CIV. P. 14(a).

185. See *supra* text accompanying note 176 (discussing preclusive effect of vouching-in procedure).

186. S.C. CODE ANN. § 36-2-607(5)(a) (Law. Co-op. 1976). The res judicata effect is compromised when the first judgment is the result of a settlement agreement. See *Dodge Trucks, Inc. v. Wilson*, 140 Ga. App. 743, 745-47, 231 S.E.2d 818, 820-21 (1976), *aff'd*, 238 Ga. 636, 235 S.E.2d 142 (1977).

187. See, e.g., *Smith Radio Communications, Inc. v. Challenger Equip., Ltd.*, 270 Or. 322, 527 P.2d 711 (1974).

188. See *Black v. Don Schmid Motor, Inc.*, 232 Kan. 458, 657 P.2d 517 (1983); *Masingale v. Northwest Cortez, Inc.*, 27 Wash. App. 749, 620 P.2d 1009 (1980); *Schroeder v. Fageol Motors, Inc.*, 12 Wash. App. 161, 528 P.2d 992 (1974), *aff'd in part, rev'd in part*, 86 Wash. 2d 256, 544 P.2d 20 (1975).

189. *Uniroyal, Inc. v. Chambers Gasket & Mfg., Co.*, 177 Ind. App. 508, 380 N.E.2d 571 (1978).

190. 232 Kan. 458, 657 P.2d 517 (1983).

191. *Id.* at 474, 657 P.2d at 530.

ute must be closely followed.¹⁹² First, an outstanding judgment must exist to create preclusive effect. In fact, in the absence of a judgment, the vouchee is not bound.¹⁹³ As stated by the Georgia Court of Appeals:

By his notice to the appellants in the action brought against him and which he settled, appellee was apparently seeking by the device of vouchment to make the appellants liable over to him. Under vouchment, the vouchee is bound by the judgment if a right over is established. Under this procedure the right over is established by a separate action against the vouchee for contribution or indemnity whether the relationship be contractual or non-contractual. Here again the necessity of a judgment is apparent.¹⁹⁴

Therefore, according to at least one court, the litigant first must have a judgment.

Other procedural hurdles include the form of the vouching-in letter.¹⁹⁵ In considering this issue, one court invalidated a letter demanding that the seller assume the defense of an action against the buyer.¹⁹⁶ The letter also specifically stated that the buyer claimed indemnity from the seller, but did not expressly state that the seller would be bound by any determination in the action.¹⁹⁷ The court thus concluded that the letter was not substantively adequate.¹⁹⁸ Accordingly, although jurisdictions differ as to what specifically is required in a vouching-in letter,¹⁹⁹ the letter at least should contain statements covering the statutory language for the request to defend, as well as the consequences of the failure to defend.²⁰⁰

These statutes also require that the notice be seasonable,²⁰¹ meaning that the notice must be within a reasonable time.²⁰² Generally, the courts require that the vouchee have sufficient notice so that he will have time to prepare a defense of the case.²⁰³

192. *Crews v. Ramirez*, 18 U.C.C. Rep. Serv. (Callaghan) 919 (Cal. Ct. App. 1976).

193. *Dodge Trucks, Inc. v. Wilson*, 140 Ga. App. 743, 231 S.E.2d 818 (1976), *aff'd*, 238 Ga. 636, 235 S.E.2d 142 (1977).

194. *Id.* at 746-47, 231 S.E.2d at 821 (citation omitted).

195. For text of the statutory requirements for a vouching-in letter, see *supra* note 170.

196. See *Crews v. Ramirez*, 18 U.C.C. Rep. Serv. (Callaghan) 919 (Cal. Ct. App. 1976).

197. *Id.* at 922.

198. *Id.* at 923.

199. See Annotation, *Sufficiency and Timeliness of Notice by Indemnatee to Indemnitor of Action by Third Person*, 73 A.L.R.2d 504, 518-24 (1960).

200. See, e.g., S.C. CODE ANN. § 36-2-607(5)(a) (Law. Co-op. 1976).

201. See, e.g., *id.*

202. *Id.* § 36-1-204(3).

203. For interesting early South Carolina cases addressing this issue, see *Davis v.*

Assuming that the voucher is successful in meeting these procedural requirements, the voucher still must be able to prove that common issues between the two cases exist in the second case.²⁰⁴ Otherwise, the buyer may have to prove the same facts that established liability in the original suit.

Vouchers, therefore, should use special interrogatories and other devices to establish that the jury in the first action reached a verdict based on a product or good transferred by the buyer with its condition unchanged and without the buyer's negligence.²⁰⁵ If a genuine issue of material fact exists as to what actually was determined in the first case, then the voucher may not obtain summary judgment in the second case based upon the facts of the first.²⁰⁶ As one court stated, "It is necessary to isolate the common issues of fact determined in [the first case] to ascertain whether any factual issues essential to [the] indemnity claim . . . remain unresolved, precluding entry of summary judgment on the issue of indemnity."²⁰⁷ Thus a buyer whose upstream seller declines the case should use every available procedural means to establish the essential facts in the first lawsuit upon which the indemnity would be predicated in the second lawsuit against the seller.

In summary, the vouching-in process works as a procedural device for perfecting an indemnity claim under the U.C.C. Thus, as long as the procedural requirements under the Code are followed, a downstream buyer hailed into court by a customer or other injured party has a potent defensive weapon.

VII. CONCLUSION

Despite the availability of contribution as a remedy in South Carolina, contribution will not supplant the more traditional remedy of indemnity. Although the availability of indemnity is traditionally limited

Wilbourne, 19 S.C.L. (1 Hill) 27, 29 (1832) ("Sufficient time to prepare evidence for trial would be sufficient."); *Goodwyn v. Taylor*, 4 S.C.L. (2 Brev.) 171, 172 (1807) ("If he is a stranger to the action, that is, not a party, he ought to have notice within a reasonable time, that the verdict, if it is had against the defendant, will be used against himself . . ."). See also *U.S. Wire & Cable Corp. v. Ascher Corp.*, 34 N.J. 121, 167 A.2d 633 (1961) (mere notice of breach of warranty suit not sufficient to vouch in seller); *Dixon v. Fiat-Roosevelt Motors, Inc.*, 8 Wash. App. 689, 509 P.2d 86 (1973) (tender of defense doctrine equivalent to vouching-in).

204. See *supra* text accompanying notes 186-89.

205. See, e.g., *S.C.R. Civ. P. 49(b)* ("The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict.").

206. See *International Harvester Co. v. TRW, Inc.*, 107 Idaho 1123, 695 P.2d 1262 (1985).

207. *Id.* at 1126, 695 P.2d at 1265 (citation omitted).

to cases in which the party seeking relief is itself not negligent, it nevertheless remains an effective remedy since it transfers all liability and expense to the entity responsible for damage done to the third party.